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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 13

CONTRACTS

CHAPTER 1

GENERAL PROVISIONS

13-1-8. Contract defined — Entire and severable contracts.

Law reviews. — For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

13-1-11. Validity and enforcement of obligations to pay attorney's fees upon notes or other evidence of indebtedness.

(a) Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectable as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to subsection (b) of this Code section and to the following provisions:

(1) If such note or other evidence of indebtedness provides for attorney's fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness;

(2) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other

evidence of indebtedness and 10 percent of the amount of principal and interest owing thereon in excess of $500.00; and

(3) The holder of the note or other evidence of indebtedness or his or her attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(b)(1) If, in a civil action, application of the provisions of paragraph (2) of subsection (a) of this Code section will result in an award of attorney's fees in an amount greater than $20,000.00, the party required to pay such fees may, prior to the entry of judgment, petition the court seeking a determination as to the reasonableness of such attorney's fees.

(2) In response to a petition filed under paragraph (1) of this subsection, the party requesting the attorney's fees shall submit an affidavit to the court with evidence of attorney's fees, and the party required to pay such fees may respond to such affidavit.

(3) The court may hold a hearing to decide the matter of attorney's fees or may award attorney's fees based on the written evidence submitted to the court. The amount of attorney's fees awarded shall be an amount found by the court to be reasonable and necessary for asserting the rights of the party requesting attorney's fees.

(4) This subsection shall not apply to a party against whom a default judgment is to be entered pursuant to Code Section 9-11-55.

(5) A civil action instituted solely for the purpose of invoking this subsection shall be void ab initio.

(c) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to this Code section where applicable.

(d) The provisions of this Code section shall not authorize the recovery of attorney's fees in any tort claim. (Ga. L. 1890-91, p. 221, § 1; Civil Code 1895, § 3667; Ga. L. 1900, p. 53, § 1; Civil Code 1910, § 4252; Code 1933, § 20-506; Ga. L. 1946, p. 761, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 545, § 1; Ga. L. 1957, p. 264, § 1; Ga. L. 1968, p. 317,

§ 1; Ga. L. 2010, p. 878, § 13/HB 1387; Ga. L. 2012, p. 1035, § 1/SB 181.)

The 2012 amendment, effective July 1, 2012, inserted "subsection (b) of this Code section and to" near the end of the introductory language of subsection (a); added present subsection (b); redesignated former subsection (b) as present subsection (c); and added subsection (d). See editor's notes for effective date and applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, in subsection (d), "Code" was inserted before "section" and "attorney's" was substituted for "attorneys".

Editor's notes. — Ga. L. 2012, p. 1035, § 3/SB 181, approved by the Governor May 2, 2012, provided that the effective date of the amendment to this Code section is July 1, 2011, and that the amendment of this Code section applies to contracts entered on or after July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date and applicability provisions that precede the date of approval by the Governor.

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Defenses to collection action. — Bank was entitled to collect upon the indebtedness of a defaulted loan because the evidence did not support either of the defenses of estoppel or breach of an implied duty of good faith and fair dealing in opposition to the bank's collection claims. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

Application

Provision of lease agreement enforceable.

Trial court did not err in awarding attorney fees and expenses to landlords because the landlords prevailed in a tenant's breach of contract action; pursuant to the tenant's lease agreement, the "prevailing party" in any litigation to enforce a right or collect sums due under the lease could recover reasonable attorney fees and litigation expenses, and the trial court awarded fees and expenses after concluding that the landlords were the prevailing parties. Office Depot, Inc. v. Dist. at Howell Mill, LLC, 309 Ga. App. 525, 710 S.E.2d 685 (2011).

Calculation of Attorney's Fees

Trial court erred in failing to reduce attorney fees awarded by jury. — Trial court erred in failing to reduce the amount of attorney fees a jury awarded a lessor pursuant to O.C.G.A. § 13-1-11 because the jury found that lessees owed $103,954 in unpaid rent under the lease contract and awarded the lessor $67,734 in attorney fees, but under § 13-1-11(a)(1), the maximum recovery under the lease, where the principal owing had been found to be $103,954, was limited to 15 percent of that amount, or $15,593. Level One Contact, Inc. v. BJL Enters., LLC, 305 Ga. App. 78, 699 S.E.2d 89 (2010).

Notice

4. Timing of Notice

Separate notice in writing after maturity required. — Trial court erred by awarding the creditors attorney fees pursuant to a promissory note because the debt instruments themselves, including the promissory note, the note modification, and the personal guarantee did not satisfy the notice requirement of O.C.G.A. § 13-1-11(a)(3); the statute plainly requires a separate notice in writing after maturity. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

5. Content and Form of Notice

Inadequate, misleading, and insufficient notice. — Trial court erred by awarding the creditors attorney fees pursuant to a promissory note because the creditors failed to provide the debtor and the guarantor sufficient and timely notice of the creditors intent to pursue such fees, as required by O.C.G.A. § 13-1-11(a)(3); the demand letters did not satisfy the requirement because the letters did not state that the guarantor could avoid the guarantor's obligation to pay attorney fees by curing the guarantor's default within ten days of the notice, as required by the statute, and the complaint itself did not satisfy the notice requirement because the complaint incorporated a deficient demand letter, which did not cure the letter's lack of notice, and rather than notifying the guarantor that the guarantor had an opportunity to avoid paying attorney fees by timely curing the default, the complaint stated the opposite, i.e., that the creditors were entitled to recover reasonably incurred attorneys' fees. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

6. Substantial Compliance

Substantial compliance with notice requirement is condition precedent to collection of attorney fees.

By the terms of O.C.G.A. § 13-1-11(a), compliance with that Code section is a statutory prerequisite to collecting an otherwise valid obligation to pay attorney fees incurred in the collection on a note; if the debtor cures the debt in compliance with the requisite ten-day notice period, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement, O.C.G.A. § 13-1-11(a)(3), which is true as a matter of statutory law, regardless of whether the parties agreed to such a ten-day grace period and, therefore, O.C.G.A. § 13-1-11(a)(3) creates a mandatory condition precedent to the debtor's obligation to pay attorney fees expended by the lender while collecting on a note. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Sufficient notice given.

Trial court did not err in granting a corporation's motion for summary judgment on the corporation's claim for attorney fees under O.C.G.A. § 13-1-11 on the damages a jury awarded the corporation in the corporation's suit against a textile company for anticipatory breach of contract because there was no genuine issue of material fact as to whether the demand letter the corporation issued to the textile company was defective under § 13-1-11 since the demand letter substantially complied with § 13-1-11 by setting forth the face value of the unpaid debt obligation, $2 million, even if the corporation ultimately could recover somewhat less than that amount after a jury calculated the present value; the textile company's full payment obligations have matured, and upon the textile company's anticipatory breach of the parties' agreement, the corporation was entitled to issue a demand for the face value of the total remaining unpaid debt, $2 million, prior to the entry of judgment on the indebtedness. Textile Rubber & Chem. Co. v. Thermo-Flex Techs., Inc., 308 Ga. App. 89, 706 S.E.2d 728 (2011).

13-1-13. Recovery of voluntary payments.

JUDICIAL DECISIONS

Analysis

General Consideration

Section inapplicable where payment induced by misplaced confidence, artifice, deception or fraud of party paid.

In an action by borrowers claiming that the lender's charging of an illegal notary fee breached the parties' loan agreement, the district court erred in concluding that, regardless of whether a breach occurred, O.C.G.A. § 13-1-13 barred recovery because Georgia's Supreme Court, in response to a certified question, concluded that the borrowers had alleged sufficient artifice, deception, or fraudulent practice to trigger an exception to § 13-1-13. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318 (11th Cir. 2010).

Voluntary Payments

Subrogee's claim barred.

Trial court did not err in granting a contractor summary judgment in an insurer's action to recover for the property damage a church sustained when the contractor installed an air conditioning system because the action was barred by the voluntary payment doctrine since the insurer paid the church for the church's loss and had no contractual obligation to do so, and under the church's policy, the insurer could not recover for a loss against a third party unless the loss was paid under the covered property coverage; prior to paying the church, the insurer had full knowledge of the facts pertaining to the loss, having received several reports from an adjuster, and the fact that the insurer had an assignment did not change the result because it was trying to recover the same amount from the contractor that the insurer paid for the loss. Southern Mut. Church Ins. Co. v. ARS Mech., LLC, 306 Ga. App. 748, 703 S.E.2d 363 (2010).

Voluntary payment doctrine not a bar to recovery of excessive notary charges. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that the voluntary payment doctrine of O.C.G.A. § 13-1-13 did not bar a breach of contract claim based on the excessiveness of the charges, as there was sufficient artifice, deception, or fraudulent practice by the mortgagee's misrepresentation under O.C.G.A. § 45-17-11(d) that the charges were "reasonable and necessary." Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

CHAPTER 2

CONSTRUCTION

13-2-1. Construction of contracts by courts generally; findings of fact by juries.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Clayton v. S. Gen. Ins. Co., 306 Ga. App. 394, 702 S.E.2d 446 (2010); MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Application

Guaranty.

Trial court did not err by finding a guarantor personally liable on a promissory note because the trial court correctly found that the language of the promissory note, the unconditional guaranty, and the modification to the promissory note were unambiguous, and since the documents' provisions were clear, the trial court's proper role was to apply the terms as written; in the guaranty, the guarantor expressly waived all notices or defenses to which the guarantor could be entitled under the guaranty, to the extent permitted by law, and because the guarantor failed to assert any defense based upon an alleged incompetency to enter into a contract at the time the guarantor executed the guaranty, and because the guarantor failed to show that the guaranty's broad waiver of defenses was prohibited by statute or public policy, the guarantor was bound thereby. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

13-2-2. Rules for interpretation of contracts generally.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

1. Application in General

Cited in S. Point Retail Ptnrs, LLC v. N. Am. Props. Atlanta, Ltd., 304 Ga. App. 419, 696 S.E.2d 136 (2010).

4. Jury-Court Determinations

Construction of consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating

that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

Parol Evidence

2. Distinct Collateral Oral Agreements

Parol evidence of release from guaranties inadmissible. — Guarantors' claims that the guarantors entered into written agreements with a bank releasing the guarantors from their guaranty agreements was not supported by any evidence; there was nothing to satisfactorily account for the absence of the written agreements, O.C.G.A. § 24-5-4(a), and any oral assurances by bank personnel were inadmissible to vary from the terms of the guaranty agreements under O.C.G.A. § 13-2-2(1). Windham & Windham, Inc. v. Suntrust Bank, 313 Ga. App. 841, 723 S.E.2d 70 (2012).

Construction of Words

Ordinary meanings.

Applying O.C.G.A. § 13-2-2(2) to interpret the plain language of a commercial lease agreement providing that the tenant was responsible for all expenses for the entire property and building of any nature whatsoever, the court of appeals concluded that the tenant's failure to repair the roof constituted default under this provision. NW Parkway, LLC v. Lemser, 309 Ga. App. 172, 709 S.E.2d 858 (2011), cert. denied, No. S11C1289, 2011 Ga. LEXIS 978 (Ga. 2011).

Preference for Upholding Contracts

Construction upholds the plain language of the parties' agreement. — Based on construction rules under O.C.G.A. § 13-2-2(1) and (4), parties' settlement agreement regarding disputed title to waterfront property required adjoining property owners to make a payment, which was conditioned on the obtaining of necessary permits; in the event the permit contingency failed, the payment was to be returned. Allen v. Sea Gardens Seafood, Inc., No. S11A1912, 2012 Ga. LEXIS 289 (Mar. 19, 2012).

Construction Against Party Executing Instrument

Construction against party drafting instrument.

Auditor's contract with a city provided that the auditor would audit accounts payable vendor files for duplicate payments, not that the auditor would audit for lost revenues; therefore, the auditor was not entitled to recover a 20 percent fee for $11 million in lost revenues the auditor discovered due to the county clerk's office using an incorrect millage rate for transfer taxes. Since the Recovery of Payment Form was ambiguous, the form was construed against the auditor as the drafter pursuant to O.C.G.A. § 13-2-2(5). ADI Fin. Servs. v. City of Atlanta, 310 Ga. App. 700, 714 S.E.2d 270 (2011).

13-2-3. Ascertainment and enforcement of intention of parties generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Meeting of minds necessary.
There was not a meeting of the minds that the purpose of the escrows was to provide a fund against which two defendants could recover on their insurance claims; no valid contract was formed and, accordingly, debtor husband's interest in the escrowed funds was the property of the bankruptcy estate. Also, as to the debtor wife, there was no meeting of the minds regarding the purpose of the escrow, and, accordingly, the wife's interest in the escrow was the property of the estate. Harris v. Nelson (In re Dunn), 436 B.R. 744 (Bankr. M.D. Ga. 2010).

Application

Construction worker was beneficiary of project's insurance requirements. — Deceased construction worker's estate had standing to enforce a provision in the project contracts requiring a subcontractor to maintain at least $ 10 million in automobile liability coverage because the worker was a "participant" in the construction project and therefore a third party beneficiary of the project contracts' terms. Estate of Pitts v. City of Atlanta, 312 Ga. App. 599, 719 S.E.2d 7 (2011).

13-2-4. Ascertainment of intention of parties where meaning placed on contract by one party known to other.

JUDICIAL DECISIONS

Construction of consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

CHAPTER 3

ELEMENTS AND FORMATION GENERALLY

ARTICLE 1

GENERAL PROVISIONS

13-3-1. Essentials of contracts generally.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Failure to show elements of enforceable contract. — Trial court did not err in granting a homeowners' association summary judgment on a resident's breach of contract claim because the resident failed to show the elements of an enforceable contract pursuant to O.C.G.A. § 13-3-1; any oral contract between the resident and a member of the association depended upon the statements of the member, who was not deposed and did not offer any affidavit, those statements, therefore, were hearsay proving nothing for the purposes of summary judgment. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Contract existence was question of fact for a jury.

Trial court erred in granting an employer summary judgment in an employee's breach of contract action alleging that the employer owed the employee money for services rendered in connection with the sale of the employer's business because the employee presented sufficient evidence that the agreement with the employer was for a definite amount of consideration; the employee presented evidence that could allow a jury to find that the contract's subject matter was established, the parties' consideration was definite, and the parties' mutual assent to all terms was complete. Thompson v. Floyd, 310 Ga. App. 674, 713 S.E.2d 883 (2011).

Documents did not comprise written contract.

Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. Ga. Dep't of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Cited in Jones v. Forest Lake Vill. Homeowners Ass'n, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

13-3-2. Contract incomplete without assent of parties to terms thereof; withdrawal of bid or proposition by party.

Law reviews. — For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

JUDICIAL DECISIONS

ANALYSIS

MUTUALITY OF ASSENT

Mutuality of Assent

No contract arises if parties have not agreed to same thing.

Debtors' breach of contract claim against a bank failed since it was clear that the trial period plan agreement, upon which those claims were based, contained none of the essential contract terms, including an agreement as to the essential terms. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

13-3-4. Effect of conditions precedent or subsequent upon rights of parties under contracts.

JUDICIAL DECISIONS

Rescission of a contract was inappropriate because of condition precedent. — Rescission of a contract was inappropriate under O.C.G.A. § 13-4-62 because the purchasers premised the purchasers' rescission for nonperformance claim upon the failure of a contingency that acted as a condition precedent in a purchase agreement and the failure to satisfy the condition precedent, that the franchisor would agree to the purchaser's obtaining the seller's ice cream store franchise, excused the parties' obligations and performance under the purchase agreement. Yi v. Li, 313 Ga. App. 273, 721 S.E.2d 144 (2011).

ARTICLE 3

CONSIDERATION

13-3-44. Effect of promise which is reasonably expected to induce action or forbearance by promisee or third person; requirement as to proof of reliance in cases of charitable subscriptions or marriage settlements.

JUDICIAL DECISIONS

Analysis

General Consideration
Promissory Estoppel
1. In General
2. Application

General Consideration

Failure to show existence of promise or representation for medical services. — Corporation and the insurance company were entitled to summary judgment on the burn center's promissory estoppel claim pursuant to O.C.G.A. § 13-3-44(a); the burn center failed to identify a single promise or representation made by the corporation or the insurance company to pay for the medical services provided to the corporation's employee and could not point to a single piece of evidence showing that the corporation or the insurance company promised to pay the usual, reasonable, and customary rate under the CPT Rules. Moreover, based on the evidence presented, there was no injustice to avoid since the burn center had been paid more than what would have been required under either Mississippi's or Georgia's workers' compensation medical fee schedules. Joseph M. Still Burn Ctrs., Inc. v. AmFed Nat'l Ins. Co., No. 109-34, 2010 U.S. Dist. LEXIS 31299 (S.D. Ga. Mar. 31, 2010).

Vague and indefinite promise. — Trial court did not err in granting a payee's motion for summary judgment in its action to collect on a promissory note and to enforce a guaranty because the payee satisfied its burden of showing the lack of a genuine issue of fact as to the defense of estoppel; although the payee's alleged promises contemplated a loan for a certain duration, the promise was vague and indefinite as to other material terms, particularly the interest rate. Ga. Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 700 S.E.2d 662 (2010).

Debtors' promissory estoppel claims against a bank failed since the alleged promise to provide a loan modification

was too vague. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

Promissory Estoppel

1. In General

Failure to show reliance on a promise.

In an action alleging multiple claims involving 33 flatbed trailers, summary judgment in favor of the trailer manufacturer was appropriate on a promissory estoppel claim because the lessee could not show that the lessee relied to the lessee's detriment upon an alleged promise that certain repairs would make the trailers safe to operate on the road; the lessee failed to present any evidence regarding the safety and effectiveness of the repair protocol. Home Depot U.S.A., Inc. v. Wabash Nat'l Corp., No. A11A1806, 2012 Ga. App. LEXIS 197 (Feb. 27, 2012).

2. Application

Consultant fees. — In an action by one consultant for unpaid fees in connection with a project to revitalize a public housing facility, material issues of fact precluded summary judgment to another consultant and the consultant's associated holding company on claims for promissory estoppel when in light of the testimony and evidence of record, including an e-mail, a trier of fact could have concluded that the second consultant promised to pay the first consultant ten percent of that consultant's net developer's fee, an amount sufficiently definite to be enforced. Jones v. White, 311 Ga. App. 822, 717 S.E.2d 322 (2011).

Insurance policies.

Although the insured argued that because of the agent's representations that the insured would provide retroactive coverage if the insured renewed the insured's policy with the insurer rather than entering into a new insurance contract with another company at a lower rate, at the very most, the insured's reliance on the agent's promise of retroactive coverage cost the insured the difference in insurance premiums; however, this theory of detrimental reliance could not provide the insured with a basis to recover damages in relation to the insurer's refusal to cover the insured's crash. Rutland v. State Farm Mut. Auto. Ins. Co., No. 10-10734, 2010 U.S. App. LEXIS 16744 (11th Cir. Aug. 12, 2010) (Unpublished).

When an insured was in a car crash after an insurer canceled the policy for failing to pay the premium and an insurance employee allegedly told the insured that the insurer would provide retroactive coverage for the crash if the insured paid the past-due amount, the insurer had no duty to defend the insured because, inter alia, promissory estoppel did not apply since the representations made by the employee occurred after the car accident and after the policy had been canceled for non-payment. Rutland v. State Farm Mut. Auto. Ins. Co., No. 10-10734, 2011 U.S. App. LEXIS 9859 (11th Cir. May 12, 2011) (Unpublished).

Homeowners' association member's promise to resident. — Trial court did not err in granting a homeowners' association summary judgment on a resident's promissory estoppel claim because the resident failed to come forward with any evidence creating an issue of fact on the resident's claim; the resident stated that a member of the association promised the resident that the association would store the resident's airboat but that claim rested on statements allegedly made to the resident by the member, which were hearsay. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Bank entitled to collect upon indebtedness of defaulted loan. — Bank was entitled to collect upon the indebtedness of a defaulted loan because the evidence did not support the defense of promissory estoppel as the alleged promise supporting the promissory estoppel claim was vague and indefinite. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

CHAPTER 4

MODIFICATION, EXTINGUISHMENT, AND RENEWAL

ARTICLE 1

GENERAL PROVISIONS

13-4-1. Alteration of written contract — Effect generally.

JUDICIAL DECISIONS

Guaranty not void. — Meaning of a guaranty was not changed by a handwritten entry and, therefore, the agreement was not void because the guaranty was already limited by a specified term; the guarantor did not show that the change materially altered the agreement. Patterson v. Bennett St. Props., No. A11A1964, 2012 Ga. App. LEXIS 299 (Mar. 19, 2012).

13-4-4. Effect of mutual departure from contract terms.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

No mutual departure from terms of lease. — Trial court was authorized to find that the landlord and the tenant never mutually departed from the terms of the lease to relieve the tenant from paying common area maintenance (CAM) charges or to permanently forgive a portion of the monthly rent that was owed; the landlord agreed to allow the tenant to temporarily pay a reduced amount of monthly rent but with the understanding that there would be no permanent rent forgiveness and that the tenant would remain liable for the accrued shortfall in base rent and CAM charges, and the landlord sent the tenant a letter consistent with that understanding. Westmoreland v. JW, LLC, 313 Ga. App. 486, 722 S.E.2d 102 (2012).

No consideration provided for departure from agreement's terms. — Partner's affirmative defense of mutual departure failed as a matter of law because there was no evidence that there was any receipt or payment of money or other consideration provided to the other partner for a departure from the terms of the partnership agreement. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

13-4-5. Effect of execution of second contract upon same matter; novation.

JUDICIAL DECISIONS

Second agreement controlled over prior agreement. — Agreement entered into in October 2005 for security services controlled a dispute between a security firm and the firm's customers, not an earlier agreement between the security firm and the customers' predecessor in interest, pursuant to O.C.G.A. § 13-4-5. USF Corp. v. Securitas Sec. Servs. USA, 305 Ga. App. 404, 699 S.E.2d 554 (2010).

ARTICLE 2

PERFORMANCE

13-4-20. Requirements as to performance of contractual obligations generally.

JUDICIAL DECISIONS

ANALYSIS

SUBSTANTIAL COMPLIANCE

Substantial Compliance

Compliance with spirit as well as letter of agreement.

Electric membership corporation (EMC) board's proxy voting bylaw amendment violated the terms of a settlement agreement reached between the EMC and the EMC's members because the amendment significantly changed the conditions under which the parties' agreed-upon plan for proposing proxy voting to the members was implemented. It therefore violated the spirit if not the letter of the agreement in contravention of O.C.G.A. § 13-4-20. Brown v. Pounds, 289 Ga. 338, 711 S.E.2d 646 (2011).

13-4-21. Effect of act of God.

JUDICIAL DECISIONS

Impossibility not due to act of God nor other party.

Defendants in a contract dispute could not defend their failure to continue to honor merchant referral requirements in the parties' contract on impossibility grounds because defendants failed to identify evidence showing that performance of their obligations was "impossible" as defined by O.C.G.A. § 13-4-21 or the doctrine of impossibility. In fact, defendants did continue with referrals for approximately a year after the merger at issue. Elavon, Inc. v. Wachovia Bank, NA, No. 1:09-CV-139-ODE, 2011 U.S. Dist. LEXIS 152004 (N.D. Ga. May 23, 2011).

13-4-23. Effect of nonperformance caused by conduct of other party.

JUDICIAL DECISIONS

Failure to exercise option to purchase property. — Trial court erred in granting a flea market operator and a property owner summary judgment in their slander of title action against a real estate investment firm and the estate of the firm's sole member because there was a genuine issue of material fact as to whether the firm was a party to the sales contract entered into between the operator and the member; if the firm and member could establish that they failed to schedule a closing on the subject property because the operator refused to sell (or to allow the owner to sell) the property, then the operator and owner could not rely upon or benefit from such a failure as a means of establishing that the firm and member failed to exercise the option to purchase the property. Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011).

Buyer's right to specific performance. — Trial court erred in granting sellers' motion for summary judgment in a buyer's action seeking specific performance of land purchase agreements because whether the buyer waived the buyer's right to specific performance remained an issue for the trier of fact; although the agreements originally made the buyer's failure to purchase a sewer plant parcel a terminating event, the parties agreed in writing at the first closing that the buyer had performed adequately nonetheless, and under the circumstances, the sellers had no basis for asserting that the buyer's failure either to buy the sewer plant or to specify the parcels in the fifth option purchase stripped the buyer, as a matter of law, of the buyer's right to specific performance. Simprop Acquisition Co. v. L. Simpson Charitable Remainder Unitrust, 305 Ga. App. 564, 699 S.E.2d 860 (2010).

ARTICLE 4

RESCISSION

13-4-60. Rescission for fraud.

JUDICIAL DECISIONS

Analysis

Rescission

Rescission and timing of lawsuit.

Genuine fact dispute existed as to whether the plaintiff timely sought rescission under O.C.G.A. § 13-4-60 when the plaintiff sought rescission contemporaneously with the filing of the plaintiff's lawsuit because the plaintiff's management decisions and continued operation of a manufacturer after a defendant arguably walked away from the joint venture were not inconsistent with rescission. Denim N. Am. Holdings, LLC v. Swift Textiles, LLC, 816 F. Supp. 2d 1308 (M.D. Ga. 2011).

Restoration of Benefits

1. In General

Restitution before absolution is general rule.

Even if there were grounds for recession of a note between a chapter debtor and trustee, recession for fraud required re-

turn of the money received under O.C.G.A. § 13-4-60, which the debtor failed to do. The fact that the debtor was financially unable to do so did not excuse this requirement. Ivey Mgmt. Corp. v. Ivey (In re Ivey Mgmt. Corp.), No. 11-5029, 2011 Bankr. LEXIS 5175 (Bankr. M.D. Ga. Dec. 22, 2011).

Insurer seeking to rescind policy required to return premiums paid under contract, even if insured originally obtained policy by fraud. — Georgia law generally required an insurer seeking to rescind a policy to return any premiums paid under the contract, even if the insured originally obtained the policy by fraud; thus, while a default against defendant insured entered on plaintiff life insurer's fraud and rescission claims, the insurer could not retain the premiums paid defendant beneficiary trust. PHL Variable Ins. Co. v. Faye Keith Jolly Irrevocable Life Ins. Trust, No. 11-12188, 2012 U.S. App. LEXIS 5283 (11th Cir. Mar. 14, 2012) (Unpublished).

13-4-62. Rescission for nonperformance.

JUDICIAL DECISIONS

When equitable action for rescission appropriate.

Rescission of a contract was inappropriate under O.C.G.A. § 13-4-62 because the purchasers premised the purchasers' rescission for nonperformance claim upon the failure of a contingency that acted as a condition precedent in a purchase agreement and the failure to satisfy the condition precedent, that the franchisor would agree to the purchaser's obtaining the seller's ice cream store franchise, excused the parties' obligations and performance under the purchase agreement. Yi v. Li, 313 Ga. App. 273, 721 S.E.2d 144 (2011).

Rescission of settlement agreement. — Trial court did not err in denying a temporary staffing agency's motion to enforce and enter judgment on a settlement agreement because, shortly after the agency entered into the settlement agreement with a widow and a decedent's estate, it announced that it would not make the payments it had agreed to make; because the entire purpose of the contract was the exchange of certain sums for a release from liability, the trial court did not err in ruling that the widow and estate had, with authority, rescinded the post-trial settlement agreement. Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 722 S.E.2d 370 (2012).

ARTICLE 6

ACCORD AND SATISFACTION

13-4-103. Acceptance of less than amount of debt.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Check did not meet criteria for establishing accord and satisfaction not met. — Trial court did not err in granting a creditor summary judgment in the creditor's action to collect the amount the creditor loaned to a debtor because a check a third party sent to the creditor did not meet the criteria of O.C.G.A. § 13-4-103(b) for accord and satisfaction when the cover letter that accompanied the check, which stated that the check was payment in full of the debt, was not an agreement between the creditor and debtor but was, at most, an agreement

between the creditor and the third party; the cover letter did not meet the statutory language requiring an agreement between "the creditor and debtor," and sending such a cover letter with a check marked "payment in full," which check was then cashed, was not an "independent" agreement and was not an agreement between the creditor and debtor. Formaro v. Suntrust Bank, 306 Ga. App. 398, 702 S.E.2d 443 (2010).

CHAPTER 5

DEFENSES

ARTICLE 2

STATUTE OF FRAUDS

13-5-30. Agreements required to be in writing.

JUDICIAL DECISIONS

Analysis

Writing Requirement Generally

Parol evidence admissible to clarify and explain ambiguities of written instrument.

Trial court erred in granting a bank's motion for summary judgment in the bank's action for breach of a guaranty because parol testimony was admissible and created a genuine issue of material fact over whether the guaranty was executed after the bank had already extended credit to the underlying debtor, and thus, over whether the guaranty was void for lack of consideration; as in the context of a deed, a witness is entitled to offer parol testimony that the guaranty was executed on a date other than the date inserted on the guaranty. Helton v. Jasper Banking Co., 311 Ga. App. 363, 715 S.E.2d 765 (2011).

Email negotiating settlement did not violate statute of frauds. — Settlement agreement did not violate the statute of frauds, O.C.G.A. § 13-5-30(4), because the email exchange between the parties was sufficient to memorialize the terms of the settlement agreement and render the agreement an enforceable contract. Johnson v. DeKalb County, No. A11A2358; No. A11A2359, 2012 Ga. App. LEXIS 282 (Mar. 14, 2012).

Promises to Answer for Debts of Another

1. In General

If guaranty omitted name of principal debtor, the guaranty was unenforceable, etc.

In a supplier's action against a construction company and the company's

principal to recover payment for building materials, the trial court did not err in granting the principal's motion for summary judgment because the guaranty the principal executed as part of a credit application was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30, for failure to identify the principal debtor, and the fact that two separate agreements involving different promisors, the application for credit and the guaranty, were included in the same two-page document did not lead inexorably to the conclusion that the documents had to be construed together, but rather, the application and guaranty had to be treated as two separate writings; the guaranty did not refer to the application with sufficient clarity to justify relying upon the application to satisfy the statute of frauds and did not incorporate the terms of the application by reference, and while the guaranty stated that it was a "continuing guaranty" that covered all indebtedness due or which could become due, the application referred to an extension of credit for materials related to one specified subdivision. LaFarge Bldg. Materials, Inc. v. Pratt, 307 Ga. App. 767, 706 S.E.2d 131 (2011).

3. Application

Guaranty contract.

Statute of frauds did not bar a landlord's claim on a guaranty because the guaranty identified the debt, and the assignment contemplated in the guaranty was documented by a written agreement; when read together the documents identified the principal debt as required by the statute of frauds and, in addition, the guaranty sufficiently identified the principal debtor and provided that the guarantor consented to any subsequent assignment. Patterson v. Bennett St. Props., No. A11A1964, 2012 Ga. App. LEXIS 299 (Mar. 19, 2012).

Corporate officers not individually liable for corporate debt. — Plain language of the document, although poorly drafted, established that the document was a promissory note made between two lenders and a corporation, and the officers signed the document in their representative capacity on behalf of the corporation. A provision that the officers personally guaranteed the debt could not be implied pursuant to O.C.G.A. § 10-7-3. Elwell v. Keefe, 312 Ga. App. 393, 718 S.E.2d 587 (2011).

Contracts Transferring Interests in Land

3. Writing

Debtor's principal believed that the principal had a commitment in written form on the record, but, while the documents evidenced an active effort to place permanent loans for purchasers of condominium units, there was nothing which remotely met the standard for proving a loan commitment. Darby Bank & Trust Co. v. Captain's Watch, LLC (In re Captain's Watch, LLC), 447 B.R. 903 (Bankr. S.D. Ga. 2010).

4. Application

Oral agreement to purchase a homeowner's association lien. — Oral agreement to buy a homeowner's association's lien and indebtedness against real property was required to be in writing and signed by the party to be charged pursuant to O.C.G.A. § 13-5-30(4); because the buyer did not acquire an interest in the property until after the date of redemption, contrary to O.C.G.A. §§ 48-4-40 and 48-4-41, the redemption was void. DRST Holdings, Ltd. v. Brown, 290 Ga. 317, 720 S.E.2d 626 (2012).

Agreements Not to Be Performed Within One Year

Oral severance agreement barred by statute of frauds. — Trial court did not clearly err in holding that enforcement of an oral severance agreement was barred by the statute of frauds, O.C.G.A. § 13-5-30(5), because a hospital's counsel clearly and unambiguously asked a doctor if the draft employment agreement, which provided that the severance would be payable for 15 months from the effective date of termination, contained a written description of the severance terms that the doctor had agreed upon, and the doctor answered in the affirmative; the trial court determined that the doctor's deposition responses constituted a clear and

unambiguous admission of the 15-month payment term, and the court's ruling as to the reasonableness of the doctor's explanation was not clearly erroneous. Bithoney v. Fulton-Dekalb Hosp. Auth., 313 Ga. App. 335, 721 S.E.2d 577 (2011).

Affidavit related to employment contract not to be fully performed within one year. — Chief executive officer was not entitled to partial summary judgment on a claim that an employer did not fund the chief executive officer's deferred compensation plan because: (1) the only evidence of the amount the employer was to contribute was the chief executive officer's self-serving affidavit; and (2) the statute of frauds barred consideration of the affidavit, since the chief executive officer's employment contract was not to be performed within one year. Jones v. Hous. Auth. of Fulton County, No. A11A1835, 2012 Ga. App. LEXIS 303 (Mar. 20, 2012).

Effect of Full or Part Performance

Guaranty enforceable without execution date. — Express language of a personal guaranty for present and future debts owed by the borrower meant that the guarantor's obligations had no temporal limitation. Therefore, an execution date was not required to identify the debt covered, and the guaranty satisfied the statute of frauds, O.C.G.A. § 13-5-30(2), although the guaranty had no date. Brzowski v. Quantum Nat'l Bank, 311 Ga. App. 769, 717 S.E.2d 290 (2011).

13-5-31. Agreements enforceable without writing.

JUDICIAL DECISIONS

Analysis

Part Performance

1. In General

Part performance not applicable. — In a case in which a bank ceased efforts to foreclose on real estate securing borrowers' and guarantors' notes evidencing obligations to the bank, and sued the borrowers and guarantors on the notes, it was error to apply the "part performance" exception to the statute of frauds, O.C.G.A. § 13-5-31(3), in holding that the guarantors were estopped from asserting a statute of frauds defense against the bank because the bank's extension of credit was not partial performance proving the identity of the notes or the debtors thereon. Tampa Inv. Group, Inc. v. Branch Banking & Trust Co., No. S11G1728; No. S11G1729, 2012 Ga. LEXIS 300 (Mar. 19, 2012).

CHAPTER 6

DAMAGES AND COSTS GENERALLY

13-6-1. Purpose of damages.

JUDICIAL DECISIONS

Failure to show damages resulted from breach of car rental agreement. — Trial court erred in denying a customer's motion for summary judgment in a car rental company's breach of contract action because the company failed to ad-

duce any evidence that the damages a rental truck sustained resulted from the customer's alleged breach of the rental agreement; the company admitted that customers were not responsible for damage to rented vehicles that occurred after the vehicles were returned to the company's possession and that it would have been consistent with the company's policies and procedures for a customer to return a rented vehicle to the company's premises and leave the keys in the key drop box, and the company offered no evidence to contradict the customer's evidence that the customer's friend returned the truck undamaged to the rental lot, locked the truck's windows and doors, and placed the keys in the drop box. Norton v. Budget Rent a Car Sys., 307 Ga. App. 501, 705 S.E.2d 305 (2010).

13-6-2. Measure of damages — Generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

No damage award when unable to show damages resulted from breach. — Trial court erred in denying a customer's motion for summary judgment in a car rental company's breach of contract action because the company failed to adduce any evidence that the damages a rental truck sustained resulted from the customer's alleged breach of the rental agreement; the company admitted that customers were not responsible for damage to rented vehicles that occurred after the vehicles were returned to the company's possession and that it would have been consistent with the company's policies and procedures for a customer to return a rented vehicle to the company's premises and leave the keys in the key drop box, and the company offered no evidence to contradict the customer's evidence that the customer's friend returned the truck undamaged to the rental lot, locked the truck's windows and doors, and placed the keys in the drop box. Norton v. Budget Rent a Car Sys., 307 Ga. App. 501, 705 S.E.2d 305 (2010).

13-6-4. Determination of damages generally.

JUDICIAL DECISIONS

Award held proper.

Amount of a jury's verdict of $48,612 in favor of a builder in the builder's breach of contract action against homeowners was not against the weight of the evidence because the jury's actual damage award was well within the range of payment to which the builder was contractually entitled and was otherwise authorized by the legal evidence submitted at trial. Harris v. Tutt, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

13-6-5. Duty of injured party to lessen damages resulting from breach.

JUDICIAL DECISIONS

Lease contracts.

Landlord for a commercial lease for space in a shopping center was not required to mitigate the landlord's damages by attempting to re-let the premises because the landlord did not accept the tenant's attempted surrender of the premises when the tenant turned in the keys, but

rather, the record showed that the tenant abandoned the premises. Sirdah v. N. Springs Assocs., LLLP, 304 Ga. App. 348, 696 S.E.2d 391 (2010).

Cited in Shropshire v. Alostar Bank of Commerce, No. A11A1770; No. A11A1795; No. A11A1771, 2012 Ga. App. LEXIS 185 (Feb. 23, 2012).

13-6-6. Damages and expenses recoverable — Nominal damages.

JUDICIAL DECISIONS

Damages as precluding summary judgment.

Trial court erred in granting a rental company and an independent third party administrator summary judgment in a car owner's action alleging that they breached a settlement agreement on the ground that the owner incurred no damages from the administrator's inclusion of Medicare as a payee on the settlement check because genuine issues of fact remained with regard to damages suffered by the owner; the owner had the right to seek specific performance of an express agreement regarding the payees to be listed on the settlement check, and there was a general right to seek nominal damages in breach of contract actions. Hearn v. Dollar Rent a Car, Inc., No. A11A2355, 2012 Ga. App. LEXIS 338 (Mar. 26, 2012).

Recovery limited to nominal damages by corporation. — If a corporation was able to prove a breach of a consent judgment by the corporation's previous owner, the corporation could not show actual damages and was limited to recovering nominal damages because the corporation's claim was foreclosed by a previous decision of the court of appeals; that case was binding precedent and established that regardless of the owner's proof of claim, a sale of a motel would not have occurred, precluding the corporation's recovery of actual damages on the corporation's breach of contract claim. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

13-6-7. Damages and expenses recoverable — Liquidated damages generally.

JUDICIAL DECISIONS

When contract provides for liquidated damages, nonbreaching party cannot elect to take actual damages.

After an employee was properly awarded recovery under a liquidated damages provision in an employment contract, the employee was not entitled to recover actual damages. McBride v. Mkt. St. Mortg., No. 07-8044, 2010 U.S. App. LEXIS 11191 (10th Cir. June 2, 2010) (Unpublished).

Liquidated damages clause upheld.

District court properly found that the liquidated damages clause was enforceable under Georgia law as: (1) the district court rejected the buyer's challenges to the reasonableness of the $220,000 figure, finding that the amount selected appeared to be reasonably proportionate to the financial injury one might have expected from a breach on the part of the buyer; (2) the Georgia Supreme Court had found reasonable a forfeiture provision providing that a seller of real estate could have retained 10 percent of the purchase price upon the buyer's default; and (3) the agreement showed that the parties clearly contemplated, and intended, for the earnest money to be treated as liquidated damages in the event of a breach. Chandy v. RaceTrac Petroleum, Inc., 2005 U.S. App. LEXIS 14368 (11th Cir. July 14, 2005) (Unpublished).

Liquidated damages provision in an employment contract was upheld because the employee's injury from the employer's

breach was difficult to accurately estimate; the provision was clearly liquidated damages and not a penalty, particularly as it was designated as a liquidated damages provision; and the payments under the provision were reasonable estimates of the employee's probable losses upon the employer's termination or violation of the contract. McBride v. Mkt. St. Mortg., No. 07-8044, 2010 U.S. App. LEXIS 11191 (10th Cir. June 2, 2010) (Unpublished).

Liquidated damages clause in a hotel licensing agreement was enforceable under O.C.G.A. § 13-6-7 because the agreement was directly related to the past performance of the hotel by using a percentage of gross room revenue generated in the 36-month period prior to termination. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166 (2010).

Liquidated damages provision in an administrative services contract between a management company and health care companies was an enforceable penalty because: (1) the anticipated expenses for the new business venture could not have been easily calculated so that the injury caused by a breach of the contract was difficult to estimate with accuracy; (2) officers who helped negotiate the contract for both sides testified that the liquidated damages provision was meant to compensate the management company for lost revenues in the event of an early termination; and (3) the liquidated damages in the amount of fifty percent of remaining fees under the contract was a reasonable pre-estimate of probable loss. Mariner Health Care Mgmt. Co. v. Sovereign Healthcare, LLC, 306 Ga. App. 873, 703 S.E.2d 687 (2010).

13-6-11. Recovery of expenses of litigation generally.

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "Practice Point: Right of Publicity: A Practitioner's Enigma," see 17 J. Intell. Prop. L. 351 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Failure to prove amount of fees attributable to successful claim. — Because the evidence of attorney fees was in a lump sum and the plaintiff did not prove the amount of attorney fees attributable to the plaintiff's successful quantum meruit claim, the attorney fees award was reversed and remanded to allow the plaintiff to establish the amount of attorney fees attributable to the claim on which the plaintiff prevailed. Terrell v. Pippart, No. A11A1539, 2012 Ga. App. LEXIS 219 (Mar. 1, 2012).

Jury charges on attorney's fees under both O.C.G.A. §§ 13-6-11 and 51-7-81 improper. — Trial court erred in charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have

based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

Attorney fees not apportioned.

Award of attorneys' fees under O.C.G.A. § 13-6-11 to a broker in the broker's quantum meruit suit against a buyer was appropriate after the district court found that the buyer acted in bad faith, and an apportionment of the fees to account for the broker's unsuccessful claims was not appropriate because the district court made an explicit finding of bad faith. Litsky v. G.I. Apparel, Inc., No. 05-12351, 2005 U.S. App. LEXIS 22150 (11th Cir. Oct. 12, 2005) (Unpublished).

Inapplicable to divorce action. — There was no abuse of discretion in a trial court's denial of attorney fees to either party pursuant to O.C.G.A. § 19-6-2(a)(1) in their divorce action as the trial court properly based the court's determination upon consideration of the parties' relative financial positions; the husband could not seek attorney fees under O.C.G.A. § 13-6-11. Sponsler v. Sponsler, 287 Ga. 725, 699 S.E.2d 22 (2010).

Cited in Tyler v. Thompson, 308 Ga. App. 221, 707 S.E.2d 137 (2011).

Availability of Section to Defendants

Defendant's counterclaim not viable.

Trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable since as a compulsory counterclaim that arose out of the same facts as the complaint, the counterclaim was not independent and could not support an award of attorney fees under § 13-6-11; at the first trial, the tenant admitted and the evidence showed that it deducted a mistakenly-paid utility charges from a rent check and was due nothing under the counterclaim, and the tenant repeated those facts to the trial court during the second trial and explained that it was seeking recovery of attorney fees only. Sugarloaf Mills Ltd. P'ship v. Record Town, Inc., 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Application: In General

Attorney's fees not supportable without award of relief on underlying claim.

Because daughters were not awarded any damages in the year's support action, the daughters could not recover attorney fees pursuant to O.C.G.A. § 13-6-11. Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

School district employee who had been terminated from a position as a paraprofessional but had been reinstated during the pendency of the employee's suit alleging due process violations was not entitled to attorney's fees because the trial court properly determined that the employee's action was not an ex dilecto action entitling the employee to monetary damages, and without an award of monetary damages or other affirmative relief, there could be no award of attorney's fees. Boatright v. Glynn County Sch. Dist., No. A11A2308, 2012 Ga. App. LEXIS 322 (Mar. 22, 2012).

Computer contractor that failed to prevail on the contractor's contract claim against a state agency based on sovereign immunity was not entitled to recover attorney's fees. Ga. Dep't of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Application: Specific Examples

Not presumed trial court relied on statute. — Inasmuch as the trial court repeatedly cited O.C.G.A. § 9-15-14 and did not invoke or cite O.C.G.A.§ 13-6-11, it was not presumed the trial court relied on that statute to deny fees under O.C.G.A. § 9-15-14. O'Leary v. Whitehall Constr., 288 Ga. 790, 708 S.E.2d 353 (2011).

No fee in employer's claim for money hand and received. — Because an employer did not prevail on the employer's claims of money had and received, and unjust enrichment against a retired employee who was allegedly overpaid, the employer was not entitled to attorneys' fees and expenses pursuant to O.C.G.A. § 13-6-11. Graphic Packaging Holding Co. v. Humphrey, No. 10-12015, 2010 U.S.

App. LEXIS 23718 (11th Cir. Nov. 16, 2010) (Unpublished).

Attorney's fees in landlord/tenant relationship. — Although a trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable, the error was harmless since attorney fees were authorized under an amended lease provision allowing attorney fees to the prevailing party; the landlord was not misled or denied the opportunity to defend or offer evidence on the issue because at the first trial, the tenant asserted that it was seeking attorney fees as the prevailing party, and at the second trial, the tenant stated in its opening statement that in addition to seeking attorney fees under § 13-6-11, it was seeking and introducing evidence of attorney fees as recoverable under the lease provision, and having failed to make a contemporaneous objection when the arguments were raised and the evidence introduced, the landlord implicitly consented to the amendment of the pleadings to include the claim and waived any objections thereto. Sugarloaf Mills Ltd. P'ship v. Record Town, Inc., 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Actions based on insurer's bad faith refusal to pay insurance claim.

Mortgagee's claim for expenses of litigation, including attorney fees under O.C.G.A. § 13-6-11 was not authorized in the mortgagee's action against an insurer seeking payment of insurance proceeds because the penalties contained in O.C.G.A. § 33-4-6 were the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds. Balboa Life & Cas., LLC v. Home Builders Fin., 304 Ga. App. 478, 697 S.E.2d 240 (2010).

Attorney's fees in piercing corporate veil. — Because a corporation's officers abused the corporate form and disregarded the corporation's separateness by commingling properties, failed to observe corporate formalities, undercapitalized the corporation, and committed fraud at a real estate closing, a trial court did not err in holding the officers liable for a judgment against the corporation obtained by homeowners and in ordering the homeowners to pay the homeowners' attorney fees. Christopher v. Sinyard, 313 Ga. App. 866, 723 S.E.2d 78 (2012).

Bad faith breach of construction contract. — Trial court did not err in denying homeowners' motion for directed verdict and allowing the issue of attorney fees to go to the jury because there was evidence from which the jury could have concluded that the homeowners willfully failed to disclose and/or misrepresented to a builder certain construction costs that otherwise should have been included in the calculation of the builder's compensation; that evidence would authorize a finding of something other than a good-faith belief on the part of the homeowners that the builder was asking the homeowners to pay more than the homeowners were contractually obligated to pay. Harris v. Tutt, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

Fees when class action more profitable than action by individual. — Because the precatory nature of attorneys' fees under O.C.G.A. § 13-6-11 did not provide the same incentive for an attorney to represent an individual plaintiff as the automatic, or likely, award of fees and costs available to a prevailing plaintiff under statutes that mandated an award of attorneys' fees, the court concluded that plaintiff consumer would probably be unable to secure adequate representation to prosecute the plaintiff's claims were a class action waiver found in the plaintiff's banking services agreement to be enforced because the potential of the plaintiff's individual recovery was too small. Gordon v. Branch Banking & Trust, No. 09-15399, 2011 U.S. App. LEXIS 6275 (11th Cir. Mar. 28, 2011) (Unpublished).

Attorney's fees in bankruptcy action. — Chapter 7 debtor was collaterally estopped from relitigating a creditor's claim for a determination of nondischargeability per 11 U.S.C. § 523(a)(6) of a state court judgment for damages for malicious prosecution and intentional infliction of emotional distress because the state court litigation met all of the requirements for the application of that doctrine. Moreover, the nondischargeable debt included amounts awarded as attorneys fees per O.C.G.A. § 13-6-11. Kasper v. Turnage (In re Turnage), 460 B.R. 341 (Bankr. N.D. Ga. 2011).

Fees in dispute over repairs of vehicle. — Truck repairer's failures to repair an owner's truck to the owner's satisfaction or to agree on a trade-in price for the truck could not have justified the submission of attorney fees to the jury pursuant to O.C.G.A. § 13-6-11, such that the trial court properly granted a directed verdict under O.C.G.A. § 9-11-50 to the repairer. Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc., 311 Ga. App. 138, 714 S.E.2d 750 (2011).

General contractor prevailing in federal claim. — To the extent the general contractor prevailed on the contractor's 11 U.S.C. § 523(a)(2)(A) claim and could establish circumstances that O.C.G.A. § 13-6-11 specified, the general contractor could recover attorney's fees. Hensler & Beavers Gen. Contrs., Inc. v. Sanford (In re Sanford), No. 11-4063, 2011 Bankr. LEXIS 5222 (Bankr. N.D. Ga. Dec. 22, 2011).

Attorney's fees award not supported.

Investment bank partner was not entitled to attorney fees predicated on the successful prosecution of the investment bank partner's guaranty counterclaim against a partner who guaranteed the partnership's debts to the investment bank partner because the trial court properly granted summary judgment to the guaranty partner on the guaranty counterclaim and a bona fide controversy existed as to the investment bank partner's breach of fiduciary duty counterclaim. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Trial court erred when the court awarded the decedent's estate the attorney fees that were expended in a previous will contest in another court as no determination for the fees was made in that court. In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011).

In a breach of contract action by a city against the Georgia Interlocal Risk Management Agency, the trial court did not err in denying the city's claim for attorney fees because the city failed to show that it was entitled to such fees under O.C.G.A. § 13-6-11, given that it was not entitled to an award of damages on the underlying claim. City of College Park v. Georgia Interlocal Risk Mgmt. Agency, 313 Ga. App. 239, 721 S.E.2d 97 (2011).

Bad Faith, Fraud, and Deceit

Bad faith in original cause of action.

Trial court did not err by denying a former employee benefits plan administrator's motions for judgment as a matter of law on a client's claim for litigation expenses under O.C.G.A. § 13-6-11 because there was evidence that the administrator acted in bad faith; the evidence also authorized the jury to find that the administrator's fraud hindered the client from discovering the client's cause of action because there was evidence that a close scrutiny of the administrator's invoices would not have disclosed the cause of action. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Bad faith may be found despite existence of bona fide controversy.

Award of attorneys' fees under O.C.G.A. § 13-6-11 to a broker in the broker's quantum meruit suit against a buyer was appropriate, even if a bona fide controversy existed, since the district court specifically found that the buyer acted in bad faith, was stubbornly litigious, and caused the broker unnecessary expense and trouble. Litsky v. G.I. Apparel, Inc., No. 05-12351, 2005 U.S. App. LEXIS 22150 (11th Cir. Oct. 12, 2005) (Unpublished).

Application of Bad Faith, Fraud, and Deceit

Bad faith in sale of used medical equipment. — Debtor established that the debtor was entitled to damages for tortious interference with the debtor's resale of medical equipment from defendant manufacturers. Bad faith under O.C.G.A. § 13-6-11 required more than bad judgment or negligence, but debtor established a dishonest purpose and breach of known duty. Bailey v. Hako-Med USA, Inc. (In re Bailey), No. 09-4002, 2010 Bankr. LEXIS 6300 (Bankr. S.D. Ga. Nov. 16, 2010).

Bad faith in real estate contract.

In a construction company's breach of contract suit against a realty company and the company's principal, the realty

company was liable for attorney's fees based on the finding that the company acted in bad faith because the record supported the conclusion that the realty company and the company's employees manipulated the construction company into doing a great deal of work that was clearly beyond the written contract with the principal and, despite the construction company's reasonable expectations that the company would be paid for the work, the realty company then attempted to shield itself behind the written contract. Circle Y Constr., Inc. v. WRH Realty Servs., No. 10-13746, 2011 U.S. App. LEXIS 10629 (11th Cir. May 24, 2011) (Unpublished).

Bad faith in performance of construction contract.

Because there was evidence that the city arbitrarily denied the contractor's claim for an adjustment in price despite knowing that conditions were very different from what the parties had believed when the parties entered the contract, the trial court did not err in submitting the question of bad faith to the jury pursuant to O.C.G.A. § 13-6-11. Mayor & Aldermen of Savannah v. Batson-Cook Co., 310 Ga. App. 878, 714 S.E.2d 242 (2011).

Bad faith of member of limited liability company. — In an action involving the judicial dissolution of a limited liability company, the evidence supported the trial court's finding that an award of attorney fees was warranted pursuant to O.C.G.A. § 13-6-11 when the trial court determined that a member of the company had acted in bad faith, was stubbornly litigious, and had caused the other member unnecessary trouble and expense. Moses v. Pennebaker, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Trespass.

Jury's award of attorney fees and expenses was authorized under O.C.G.A. § 13-6-11 because bad faith existed as a neighbor's trespass onto an adjacent owner's property was both knowing and willful. The neighbor trespassed onto the owner's adjacent property by tying into the owner's sewer line without the owner's permission. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Bad faith in attorney's representation of client.

Trial court did not err in awarding summary judgment to an attorney and a law firm in a former client's legal malpractice action seeking attorney fees because the client pointed to no evidence that would support an award of attorneys' fees but instead referred generally to the acts and/or omissions made by the attorney and the firm in the representation of the client; the client did not point to any evidence that would support an award of attorneys' fees on the grounds of stubborn litigiousness and unnecessary trouble and expense. Duncan v. Klein, 313 Ga. App. 15, 720 S.E.2d 341 (2011).

Attorney's fees awarded in error.

Evidence did not support the award of attorneys' fees in favor of a truck driver because there was a genuine dispute about the amount of lost earnings the truck driver was entitled to recover. French v. Dilleshaw, 313 Ga. App. 834, 723 S.E.2d 64 (2012).

Evidence of bad faith sufficient to award attorney's fees.

While plaintiff firm was awarded only $325 in compensatory damages, in Georgia, there was no proportionality requirement between attorney's fees and compensatory damages if bad faith was shown under O.C.G.A. § 13-6-11, and since defendant convention host interfered with sales leads from another company, allowing $517,168 in fees was not error. GT Software, Inc. v. webMethods, Inc., No. 10-15423; No. 10-15628, 2012 U.S. App. LEXIS 4483 (11th Cir. Mar. 5, 2012) (Unpublished).

Stubborn Litigiousness

Evidence supported award, etc.

Evidence supported the jury's award of attorney fees under O.C.G.A. § 13-6-11 in homeowners' class action against a private water system owner because the owner adopted the position that the homeowners were obligated to remain connected to the owner's water system and pay the owner a minimum monthly connection fee only after the owner's efforts to keep those customers failed, and the vast majority of homeowners opted to go with the county system, and the jury could rely

on that evidence to find that the owner had been stubbornly litigious or had caused the class unnecessary trouble and expense; the statute contemplates that the facts in any given case may support an award of attorney fees, even if the case is resolved at trial, rather than by summary adjudication. Jones v. Forest Lake Vill. Homeowners Ass'n, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Defendant was not stubbornly litigious. — Given the complexity of the transactions and the court's finding that defendant acted appropriately in many circumstances, the court could not find that defendant was stubbornly litigious or caused plaintiff unnecessary trouble and expense; while defendant's actions could have supported a finding of bad faith under O.C.G.A. § 13-6-11, the court declined to award attorneys' fees. The evidence showed that plaintiff also acted recalcitrantly and made excessive demands and that defendant made multiple efforts to settle the matter short of litigation; the award in this case was sufficient under the circumstances. Pollitt v. McClelland (In re McClelland), No. 09-9030-WLH, 2011 Bankr. LEXIS 2224 (Bankr. N.D. Ga. June 8, 2011).

Pleadings and Practice

Waiver of objection to award of fees. — To the extent that an attorney fee award to homeowners was based on O.C.G.A. § 13-6-11, the builder had not waived the builder's right to object to the award by failing to object to the verdict form because the verdict was void due to the homeowners' failure to recover any affirmative relief. However, the Court of Appeals failed to consider the owners' alternative argument that the award was based on contract, in which case the builder could have waived the builder's right to object, requiring remand. Benchmark Builders, Inc. v. Schultz, 289 Ga. 329, 711 S.E.2d 639 (2011).

Lender's demand letter for fees sufficient. — Lender's demand letter that referenced the note signed by the borrower and advised a guarantor of the lender's intent to seek attorney's fees if the debt was not paid within ten days was sufficient, although the letter did not cite to O.C.G.A. § 13-6-11 or the specific section of the note allowing attorney's fees. Brzowski v. Quantum Nat'l Bank, 311 Ga. App. 769, 717 S.E.2d 290 (2011).

Jury-Court Determinations

Question of attorney fees under O.C.G.A. § 13-6-11 is question for jury. Pursuant to the language of O.C.G.A. § 13-6-11, a trial court erred when the court granted a tenant attorney fees thereunder as a matter of law on a summary judgment ruling as the determination of the fee issue was one within the province of the jury. Covington Square Assocs., LLC v. Ingles Mkts., 287 Ga. 445, 696 S.E.2d 649 (2010).

Trial court erred in granting attorney fees pursuant to O.C.G.A. § 13-6-11 on summary judgment because both the liability for and amount of attorney fees pursuant to § 13-6-11 were issues solely for a jury's determination. The trial court did not sit as a trier of fact on a motion for summary judgment. Crouch v. Bent Tree Cmty., 310 Ga. App. 319, 713 S.E.2d 402 (2011).

Trial court erred in granting summary judgment as to availability of fees. — Language of O.C.G.A. § 13-6-11 prevented a trial court from ever determining that a claimant is entitled to attorney fees as a matter of law. Whether the plaintiff had met any of the preconditions for an award of attorney fees and expenses was solely a question for the jury as was the amount of fees and expenses. Royal v. Blackwell, 289 Ga. 473, 712 S.E.2d 815 (2011).

Bad faith for jury determination. — Trial court did not err in denying summary judgment to a management company on a health care companies' claim for attorney's fees for bad faith under O.C.G.A. § 13-6-11 because questions concerning bad faith under § 13-6-11 were generally for the jury to decide. Mariner Health Care Mgmt. Co. v. Sovereign Healthcare, LLC, 306 Ga. App. 873, 703 S.E.2d 687 (2010).

13-6-13. Recovery of interest upon damages.

JUDICIAL DECISIONS

Damages for time value of money. — In a breach of trust action, the jury properly included "damages for the time value of money" as part of the measure of damages. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

CHAPTER 7

SETOFF AND RECOUPMENT

13-7-1. Nature of setoff generally.

JUDICIAL DECISIONS

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., No. A11A1916, 2012 Ga. App. LEXIS 329 (Mar. 23, 2012).

13-7-2. Nature of recoupment generally.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Contract dispute between founder and corporation. — In a founder's contract dispute against a corporation, neither party could be said to have not complied with the cross-obligations or independent covenants, because none existed since the contract conceived of a single obligation, the corporation paid the founder in full on the single obligation in dispute. Stewart v. Hooters of Am., Inc., No. 10-11609, 2011 U.S. App. LEXIS 13275 (11th Cir. June 28, 2011) (Unpublished).

13-7-4. Limitations as to claims or demands for setoff generally.

JUDICIAL DECISIONS

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank

and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., No. A11A1916, 2012 Ga. App. LEXIS 329 (Mar. 23, 2012).

CHAPTER 8

ILLEGAL AND VOID CONTRACTS GENERALLY

Article 1

General Provisions

Article 4

Restrictive Covenants in Contracts

ARTICLE 1

GENERAL PROVISIONS

13-8-1. Contracts to do immoral or illegal things.

JUDICIAL DECISIONS

ANALYSIS

Illegal Contracts

Agreement in violation of statutory requirements void.

Agreement between a county and a developer was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 because the agreement violated the prohibition in O.C.G.A. § 36-71-4(d) against the prepayment of impact fees; the agreement calculated the payment of impact fees not in reference to the issuance of building permits but as a sum certain for the purpose of retiring the county's debt for improving the county's water/sewer system. Effingham County Bd. of Comm'rs v. Park West Effingham, L.P., 308 Ga. App. 680, 708 S.E.2d 619 (2011).

Application

Collection of tax issue moot. — Trial court's reaching a determination that contracts were void was improper because the trial court was not called upon to decide whether various contracts were enforceable. However, because the injunction imposed by the court provided for the proper collection and remittance of a city's hotel occupancy taxes should online travel companies elect to continue to act as third-party tax collectors, the error was effectively moot and provided no basis for reversal. City of Atlanta v. Hotels.com, 289 Ga. 323, 710 S.E.2d 766 (2011).

13-8-2. Contracts contravening public policy generally.

(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to:

(1) Contracts tending to corrupt legislation or the judiciary;

(2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;

(3) Contracts to evade or oppose the revenue laws of another country;

(4) Wagering contracts; or

(5) Contracts of maintenance or champerty.

(b) A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy. (Orig. Code 1863, § 2714; Code 1868, § 2708; Code 1873, § 2750; Code 1882, § 2750; Civil Code 1895, § 3668; Civil Code 1910, § 4253; Code 1933, § 20-504;

Ga. L. 1970, p. 441, § 1; Ga. L. 1982, p. 3, § 13; Ga. L. 1989, p. 14, § 13; Ga. L. 1990, p. 1676, § 1; Ga. L. 2007, p. 208, § 1/HB 136; Ga. L. 2009, p. 231, § 1/HB 173; Ga. L. 2011, p. 399, § 2/HB 30.)

The 2011 amendment, effective May 11, 2011, in subsection (a), substituted "that" for "which" in the first sentence of paragraph (a)(1) and substituted "contracts which restrict certain competitive activities, as provided in Article 4 of this chapter" for "contracts in partial restraint of trade as provided for in Code Section 13-8-2.1" in paragraph (a)(2). See editor's note for applicability.

Editor's notes. — Ga. L. 2009, p. 231, § 4, not codified by the General Assembly, provides that the 2009 amendment becomes effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this amendment shall stand automatically repealed. The constitutional amendment (Ga. L. 2010, p. 1260) was ratified at the general election held on November 2, 2010.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to contracts entered into on and after May 11, 2011, and shall not apply in actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

Law reviews. — For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 21 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration

Agreement between county and developer void. — Agreement between a county and a developer was unenforceable under O.C.G.A. §§ 13-8-1 and 13-8-2 because the agreement violated the prohibition in O.C.G.A. § 36-71-4(d) against the prepayment of impact fees; the agreement calculated the payment of impact fees not in reference to the issuance of building permits but as a sum certain for the

purpose of retiring the county's debt for improving the county's water/sewer system. Effingham County Bd. of Comm'rs v. Park West Effingham, L.P., 308 Ga. App. 680, 708 S.E.2d 619 (2011).

1. What Contravenes Public Policy

Contingency fee agreement. — Fee-splitting agreements between a law firm, whose representation of the clients was terminated by the clients, and another lawyer could not be enforced so as to permit the law firm to receive a portion of a contingent fee when the termination occurred before the fee was earned. To allow the discharged attorney to collect a share of the contingent fee after being discharged would contravene Ga. St. Bar R. 4-102(d):1.5(e)(2), and therefore would be against public policy and unenforceable under O.C.G.A. § 13-8-2(a). Eichholz Law Firm, P.C. v. Tate Law Group, LLC, 310 Ga. App. 848, 714 S.E.2d 413 (2011), cert. denied, No. S11C1809, 2011 Ga. LEXIS 982; cert. denied, Weinstock & Scavo, P.C. v. Tate Law Group, LLC, No. S11C11812, 2011 Ga. LEXIS 989 (Ga. 2011).

Indemnity clause valid. — O.C.G.A. § 13-8-2 and public policy did not apply to bar a city's indemnity claims against the city's contractors for meter-reading software in a suit brought by city water customers based on claims that the city overcharged the customers for water and sewage service because the customers' claims were not for injury to person or property. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Exculpatory Clauses

Indemnity clause void and unenforceable.

Applying the reference in O.C.G.A. § 13-8-2(b) (amended effective July 1, 2007) to "the construction, alteration, repair, or maintenance of a building structure, appurtenances, or appliances, including moving, demolition, and excavating connected therewith" liberally in the case, the developer's work on the subdivision property and the detention pond and its spillway fell within the ambit of § 13-8-2(b), and it followed that, because the assignment and assumption agreement directly related to such work by purportedly indemnifying the developer for any liability arising from it, § 13-8-2(b) applied to the agreement. Moreover, because the indemnification provision improperly shifted all of the developer's liability to the homeowners' association, even for claims based solely upon the developer's actions or omissions, the indemnification provision of the assignment and assumption agreement was void and unenforceable under § 13-8-2(b), and the trial court erred in denying the association's motion for summary judgment on the developer's third party complaint against the homeowners' association for indemnification. Newton's Crest Homeowners' Ass'n v. Camp, 306 Ga. App. 207, 702 S.E.2d 41 (2010).

Georgia's anti-indemnity statute for construction contracts, O.C.G.A. § 13-8-2(b), applied to invalidate an indemnification clause within an assignment and assumption agreement transferring responsibility for the management and operation of a newly developed subdivision to its homeowners' association. Kennedy Dev. Co. v. Camp, 290 Ga. 257, 719 S.E.2d 442 (2011).

13-8-2.1. Contracts in partial restraint of trade.

Repealed by Ga. L. 2011, p. 399, § 3/HB 30, effective May 11, 2011.

Editor's notes. — This Code section was based on Code 1981, § 13-8-2.1, enacted by Ga. L. 1990, p. 1676, § 2; Ga. L. 1991, p. 94, § 13; Ga. L. 2009, p. 231, § 2/HB 173.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010

legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the repeal of this Code section shall apply to contracts entered into on and after May 11, 2011, and shall not apply in actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

ARTICLE 4

RESTRICTIVE COVENANTS IN CONTRACTS

Effective date. — This article became effective May 11, 2011.

Editor's notes. — Ga. L. 2009, p. 231, § 4, not codified by the General Assembly, provides that the 2009 enactment of this article becomes effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date and that if such amendment is not so ratified, then this article shall stand automatically repealed. The constitutional amendment (Ga. L. 2010, p. 1260) was ratified at the general election held on November 2, 2010.

The former article consisted of Code Sections 13-8-50 through 13-8-59, relating to restrictive covenants in contracts, was repealed by Ga. L. 2011, p. 399, § 4, effective May 11, 2011, and was based on Code 1981, §§ 13-8-50 — 13-8-59, enacted by Ga. L. 2009, p. 231, § 3/HB 173.

Ga. L. 2011, p. 399, § 1, not codified by the General Assembly, provides: "During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid."

Ga. L. 2011, p. 399, § 5, not codified by the General Assembly, provides, in part, that the enactment of this article shall apply to contracts entered into on and after May 11, 2011, and shall not apply in actions determining the enforceability of restrictive covenants entered into before May 11, 2011.

Law reviews. — For article, "Georgia Gets Competitive," see 15 (No. 4) Ga. St. B.J. 13 (2009). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010). For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 21 (2011).

13-8-50. Legislative findings.

The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions. (Code 1981, § 13-8-50, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U. L. Rev. 21 (2011).

13-8-51. Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with another person or entity;

(B) Any entity of which a person is an officer, director, or partner or holds an equity interest or ownership position that accounts for 25 percent or more of the voting rights or profit interest of such entity;

(C) Any trust or other estate in which the person or entity has a beneficial interest of 25 percent or more or as to which such person or entity serves as trustee or in a similar fiduciary capacity; or

(D) The spouse, lineal ancestors, lineal descendants, and siblings of the person, as well as each of their spouses.

(2) "Business" means any line of trade or business conducted by the seller or employer, as such terms are defined in this Code section.

(3) "Confidential information" means data and information:

(A) Relating to the business of the employer, regardless of whether the data or information constitutes a trade secret as that term is defined in Code Section 10-1-761;

(B) Disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer;

(C) Having value to the employer;

(D) Not generally known to competitors of the employer; and

(E) Which includes trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information;

provided, however, that such term shall not mean data or information (A) which has been voluntarily disclosed to the public by the employer, except where such public disclosure has been made by the employee without authorization from the employer; (B) which has been independently developed and disclosed by others; or (C) which has otherwise entered the public domain through lawful means.

(4) "Controlling interest" means any equity interest or ownership participation held by a person or entity with respect to a business that accounts for 25 percent or more of the voting rights or profit interest of the business prior to the sale, alone or in combination with the interest or participation held by affiliates of such person or entity.

(5) "Employee" means:

(A) An executive employee;

(B) Research and development personnel or other persons or entities of an employer, including, without limitation, independent contractors, in possession of confidential information that is important to the business of the employer;

(C) Any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer; or

(D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or a sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements.

Such term shall not include any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information.

(6) "Employer" means any corporation, partnership, proprietorship, or other business organization, whether for profit or not for profit, including, without limitation, any successor in interest to such an entity, who or that conducts business or any person or entity who or that directly or indirectly owns an equity interest or ownership

participation in such an entity accounting for 25 percent or more of the voting rights or profit interest of such entity. Such term also means the buyer or seller of a business organization.

(7) "Executive employee" means a member of the board of directors, an officer, a key employee, a manager, or a supervisor of an employer.

(8) "Key employee" means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.

(9) "Legitimate business interest" includes, but is not limited to:

(A) Trade secrets, as defined by Code Section 10-1-761;

(B) Valuable confidential information that otherwise does not qualify as a trade secret;

(C) Substantial relationships with specific prospective or existing customers, patients, vendors, or clients;

(D) Customer, patient, or client good will associated with:

(i) An ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;

(ii) A specific geographic location; or

(iii) A specific marketing or trade area; and

(E) Extraordinary or specialized training.

(10) "Material contact" means the contact between an employee and each customer or potential customer:

(A) With whom or which the employee dealt on behalf of the employer;

(B) Whose dealings with the employer were coordinated or supervised by the employee;

(C) About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or

(D) Who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.

(11) "Modification" means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:

(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and

(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.

(12) "Modify" means to make, to cause, or otherwise to bring about a modification.

(13) "Products or services" means anything of commercial value, including, without limitation, goods; personal, real, or intangible property; services; financial products; business opportunities or assistance; or any other object or aspect of business or the conduct thereof.

(14) "Professional" means an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.

(15) "Restrictive covenant" means an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties, to which the second party has gained access in the course of his or her relationship with the first party or parties, or which the first party or parties has acquired from the second party as the result of a sale. Such restrictive covenants may exist within or ancillary to contracts

between or among employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, employers and independent contractors, franchisors and franchisees, and sellers and purchasers of a business or commercial enterprise and any two or more employers. A restrictive covenant shall not include covenants appurtenant to real property.

(16) "Sale" means any sale or transfer of the good will or substantially all of the assets of a business or any sale or transfer of a controlling interest in a business, whether by sale, exchange, redemption, merger, or otherwise.

(17) "Seller" means any person or entity, including any successor-in-interest to such an entity, that is:

(A) An owner of a controlling interest;

(B) An executive employee of the business who receives, at a minimum, consideration in connection with a sale; or

(C) An affiliate of a person or entity described in subparagraph (A) of this paragraph; provided, however, that each sale involving a restrictive covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in the covenant, any entity that directly or indirectly through one or more affiliates is controlled by or is under common control of such person or entity.

(18) "Termination" means the termination of an employee's engagement with an employer, whether with or without cause, upon the initiative of either party.

(19) "Trade dress" means the distinctive packaging or design of a product that promotes the product and distinguishes it from other products in the marketplace. (Code 1981, § 13-8-51, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U. L. Rev. 21 (2011).

13-8-52. Application.

(a) The provisions of this article shall be applicable only to contracts and agreements between or among:

(1) Employers and employees;

(2) Distributors and manufacturers;

(3) Lessors and lessees;

(4) Partnerships and partners;

(5) Franchisors and franchisees;

(6) Sellers and purchasers of a business or commercial enterprise; and

(7) Two or more employers.

(b) The provisions of this article shall not apply to any contract or agreement not described in subsection (a) of this Code section. (Code 1981, § 13-8-52, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-53. Enforcement of covenants; writing requirement; determining competitive status; effect of failure to comply; time and geographic limitations.

(a) Notwithstanding any other provision of this chapter, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. However, enforcement of contracts that restrict competition after the term of employment, as distinguished from a customer nonsolicitation provision, as described in subsection (b) of this Code section, or a nondisclosure of confidential information provision, as described in subsection (e) of this Code section, shall not be permitted against any employee who does not, in the course of his or her employment:

(1) Customarily and regularly solicit for the employer customers or prospective customers;

(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;

(3) Perform the following duties:

(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(B) Customarily and regularly direct the work of two or more other employees; and

(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or

(4) Perform the duties of a key employee or of a professional.

(b) Notwithstanding any other provision of this chapter, an employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempt-

ing to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against "soliciting or attempting to solicit business from customers" or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products or services that are competitive with those provided by the employer's business.

(c)(1) Activities, products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer. Whenever a description of activities, products, or services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters. In case of a post-employment covenant entered into prior to termination, any good faith estimate of the activities, products, or services, or geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, or services, or geographic areas. The post-employment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products or services actually offered, or the geographic areas actually involved within a reasonable period of time prior to termination.

(2) Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase "of the type conducted, authorized, offered, or provided within two years prior to termination" or similar language containing the same or a lesser time period. The phrase "the territory where the employee is working at the time of termination" or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.

(d) Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided,

however, that a court may modify a covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.

(e) Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable. (Code 1981, § 13-8-53, enacted by Ga. L. 2011, p. 399, § 4/HB 30; Ga. L. 2012, p. 775, § 13/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (c)(1).

JUDICIAL DECISIONS

Restrictive covenants in non-compete unenforceable. — Because the court had already found that one of the sub-parts of the non-compete was unenforceable under Georgia law, none of the restrictive covenants contained in the non-compete were enforceable. Boone v. Corestaff Support Servs., 805 F. Supp. 2d 1362 (N.D. Ga. 2011).

13-8-54. Judicial construction of covenants.

(a) A court shall construe a restrictive covenant to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement.

(b) In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible. (Code 1981, § 13-8-54, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-55. Requirements of person seeking enforcement of covenants.

The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53,

then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable. (Code 1981, § 13-8-55, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-56. Reasonableness determinations restricting competition; presumptions.

In determining the reasonableness of a restrictive covenant that limits or restricts competition during or after the term of an employment or business relationship, the court shall make the following presumptions:

(1) During the term of the relationship, a time period equal to or measured by duration of the parties' business or commercial relationship is reasonable, provided that the reasonableness of a time period after a term of employment shall be as provided for in Code Section 13-8-57;

(2) A geographic territory which includes the areas in which the employer does business at any time during the parties' relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that:

(A) The total distance encompassed by the provisions of the covenant also is reasonable;

(B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a business or commercial relationship; or

(C) Both subparagraphs (A) and (B) of this paragraph;

(3) The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given; provided, however, that a court shall not refuse to enforce the provisions of a restrictive covenant because the person seeking enforcement establishes evidence that a restrictive covenant has been violated but has not proven that the covenant has been violated as to the entire scope of the prohibited activities of the person seeking enforcement or as to the entire geographic area of the covenant; and

(4) Any restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or geographic area so long

as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any potential conflict of interest. (Code 1981, § 13-8-56, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

Law reviews. — For article, "Contracts: Illegal and Void Contracts Generally," see 28 Ga. St. U. L. Rev. 21 (2011).

13-8-57. Reasonableness determinations restricting time; presumptions.

(a) In determining the reasonableness in time of a restrictive covenant sought to be enforced after a term of employment, a court shall apply the rebuttable presumptions provided in this Code section.

(b) In the case of a restrictive covenant sought to be enforced against a former employee and not associated with the sale or ownership of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint two years or less in duration and shall presume to be unreasonable in time any restraint more than two years in duration, measured from the date of the termination of the business relationship.

(c) In the case of a restrictive covenant sought to be enforced against a current or former distributor, dealer, franchisee, lessee of real or personal property, or licensee of a trademark, trade dress, or service mark and not associated with the sale of all or a part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint three years or less in duration and shall presume to be unreasonable in time any restraint more than three years in duration, measured from the date of termination of the business relationship.

(d) In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise,

a court shall presume to be reasonable in time any restraint the longer of five years or less in duration or equal to the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection and shall presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection, measured from the date of termination or disposition of such interest. (Code 1981, § 13-8-57, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-58. Enforcement by third parties.

(a) A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract.

(b) In determining the enforceability of a restrictive covenant, it is not a defense that the person seeking enforcement no longer continues in business in the scope of the prohibited activities that is the subject of the action to enforce the restrictive covenant if such discontinuance of business is the result of a violation of the restriction.

(c) A court shall enforce a restrictive covenant by any appropriate and effective remedy available at law or equity, including, but not limited to, temporary and permanent injunctions.

(d) In determining the reasonableness of a restrictive covenant between an employer and an employee, as such term is defined in subparagraphs (A) through (C) of paragraph (5) of Code Section 13-8-51, a court may consider the economic hardship imposed upon an

employee by enforcement of the covenant; provided, however, that this subsection shall not apply to contracts or agreements between or among those persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52. (Code 1981, § 13-8-58, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

13-8-59. Construction with federal provisions.

Nothing in this article shall be construed or interpreted to allow or to make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of the United States or under the Constitution of this state or of the United States. (Code 1981, § 13-8-59, enacted by Ga. L. 2011, p. 399, § 4/HB 30.)

CHAPTER 10

CONTRACTS FOR PUBLIC WORKS

Article 3
Security and Immigration Compliance

ARTICLE 1

GENERAL PROVISIONS

13-10-63. Pursuit of action by person entitled to protection of payment bond; liability of public entity.

Law reviews. — For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010).

13-10-65. Time for instituting action.

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

ARTICLE 3

SECURITY AND IMMIGRATION COMPLIANCE

Law reviews. — For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L. J. 1211 (2011).

13-10-90. Definitions.

As used in this article, the term:

(1) "Commissioner" means the Commissioner of Labor.

(2) "Contractor" means a person or entity that enters into a contract for the physical performance of services with a public employer.

(3) "Federal work authorization program" means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify employment eligibility information of newly hired employees, commonly known as E-Verify, or any subsequent replacement program.

(4) "Physical performance of services" means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road; or any other performance of labor for a public employer within this state under a contract or other bidding process.

(5) "Public employer" means every department, agency, or instrumentality of the state or a political subdivision of the state with more than one employee.

(6) "Subcontractor" means a person or entity having privity of contract with a contractor and includes a contract employee or staffing agency.

(7) "Sub-subcontractor" means a person or entity having privity of contract with a subcontractor or privity of contract with another person or entity contracting with a subcontractor or sub-subcontractor. (Code 1981, § 13-10-90, enacted by Ga. L. 2006, p. 105, § 2/SB 529; Ga. L. 2010, p. 308, § 2/SB 447; Ga. L. 2011, p. 794, § 2/HB 87.)

The 2011 amendment, effective July 1, 2011, deleted "the Georgia Department of" following "Commissioner of" in paragraph (1); added paragraph (2); redesig-

nated former paragraphs (2) through (4) as present paragraphs (3) through (6), respectively; in paragraph (3), inserted "employment eligibility" near the end and substituted "commonly known as E-Verify, or any subsequent replacement program" for "pursuant to the Immigration Reform and Control Act of 1986 (IRCA), D.L. 99-603" at the end; in paragraph (4), inserted "within this state" in two places; added "with more than one employee" at the end of paragraph (5); rewrote paragraph (6); and added paragraph (7). See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that the amendment by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

13-10-91. Verification of new employee eligibility; applicability; rules and regulations.

(a) Every public employer, including, but not limited to, every municipality and county, shall register and participate in the federal work authorization program to verify employment eligibility of all newly hired employees. Upon federal authorization, a public employer shall permanently post the employer's federally issued user identification number and date of authorization, as established by the agreement for authorization, on the employer's website; provided, however, that if a local public employer does not maintain a website, then the local government shall submit such information to the Carl Vinson Institute of Government of the University of Georgia to be posted by the institute on the website created for local government audit and budget reporting. The Carl Vinson Institute of Government of the University of Georgia shall maintain the information submitted and provide instructions and submission guidelines for local governments. State departments, agencies, or instrumentalities may satisfy the requirement of this Code section by posting information required by this Code section on one website maintained and operated by the state.

(b)(1) A public employer shall not enter into a contract pursuant to this chapter for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a

public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:

(A) The affiant has registered with, is authorized to use, and uses the federal work authorization program;

(B) The user identification number and date of authorization for the affiant;

(C) The affiant will continue to use the federal work authorization program throughout the contract period; and

(D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

An affidavit required by this subsection shall be considered an open public record once a public employer has entered into a contract for physical performance of services; provided, however, that any information protected from public disclosure by federal law or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained by the public employer for five years from the date of receipt.

(2) A contractor shall not enter into any contract with a public employer for the physical performance of services unless the contractor registers and participates in the federal work authorization program.

(3) A subcontractor shall not enter into any contract with a contractor unless such subcontractor registers and participates in the federal work authorization program. A subcontractor shall submit, at the time of such contract, an affidavit to the contractor in the same manner and with the same information required in paragraph (1) of this subsection. It shall be the duty of any subcontractor receiving an affidavit from a sub-subcontractor to forward notice to the contractor of the receipt, within five business days of receipt, of such affidavit. It shall be the duty of a subcontractor receiving notice of receipt of an affidavit from any sub-subcontractor that has contracted with a sub-subcontractor to forward, within five business days of receipt, a copy of such notice to the contractor.

(4) A sub-subcontractor shall not enter into any contract with a subcontractor or sub-subcontractor unless such sub-subcontractor registers and participates in the federal work authorization program. A sub-subcontractor shall submit, at the time of such contract, an affidavit to the subcontractor or sub-subcontractor with whom such sub-subcontractor has privity of contract, in the same manner and with the same information required in paragraph (1) of this subsection. It shall be the duty of any sub-subcontractor to forward notice of

receipt of any affidavit from a sub-subcontractor to the subcontractor or sub-subcontractor with whom such receiving sub-subcontractor has privity of contract.

(5) In lieu of the affidavit required by this subsection, a contractor, subcontractor, or sub-subcontractor who has no employees and does not hire or intend to hire employees for purposes of satisfying or completing the terms and conditions of any part or all of the original contract with the public employer shall instead provide a copy of the state issued driver's license or state issued identification card of such contracting party and a copy of the state issued driver's license or identification card of each independent contractor utilized in the satisfaction of part or all of the original contract with a public employer. A driver's license or identification card shall only be accepted in lieu of an affidavit if it is issued by a state within the United States and such state verifies lawful immigration status prior to issuing a driver's license or identification card. For purposes of satisfying the requirements of this subsection, copies of such driver's license or identification card shall be forwarded to the public employer, contractor, subcontractor, or sub-subcontractor in the same manner as an affidavit and notice of receipt of an affidavit as required by paragraphs (1), (3), and (4) of this subsection. Not later than July 1, 2011, the Attorney General shall provide a list of the states that verify immigration status prior to the issuance of a driver's license or identification card and that only issue licenses or identification cards to persons lawfully present in the United States. The list of verified state drivers' licenses and identification cards shall be posted on the website of the State Law Department and updated annually thereafter. In the event that a contractor, subcontractor, or sub-subcontractor later determines that he or she will need to hire employees to satisfy or complete the physical performance of services under an applicable contract, then he or she shall first be required to comply with the affidavit requirements of this subsection.

(6) It shall be the duty of the contractor to submit copies of all affidavits, drivers' licenses, and identification cards required pursuant to this subsection to the public employer within five business days of receipt. No later than August 1, 2011, the Departments of Audits and Accounts shall create and post on its website form affidavits for the federal work authorization program. The affidavits shall require fields for the following information: the name of the project, the name of the contractor, subcontractor, or sub-subcontractor, the name of the public employer, and the employment eligibility information required pursuant to this subsection.

(7)(A) Not later than December 31 of each year, a public employer shall submit a compliance report to the state auditor certifying

compliance with the provisions of this subsection. Such compliance report shall contain the public employer's federal work authorization program verification user number and date of authorization and the legal name, address, and federal work authorization program user number of the contractor and the date of the contract between the contractor and public employer. Subject to available funding, the state auditor shall conduct annual compliance audits on a minimum of at least one-half of the reporting agencies and publish the results of such audits annually on the department's website on or before September 30.

(B) If the state auditor finds a political subdivision to be in violation of this subsection, such political subdivision shall be provided 30 days to demonstrate to the state auditor that such political subdivision has corrected all deficiencies and is in compliance with this subsection. If, after 30 days, the political subdivision has failed to correct all deficiencies, such political subdivision shall be excluded from the list of qualified local governments under Chapter 8 of Title 50 until such time as the political subdivision demonstrates to the state auditor that such political subdivision has corrected all deficiencies and is in compliance with this subsection.

(C)(i) At any time after the state auditor finds a political subdivision to be in violation of this subsection, such political subdivision may seek administrative relief through the Office of State Administrative Hearings. If a political subdivision seeks administrative relief, the time for correcting deficiencies shall be tolled, and any action to exclude the political subdivision from the list of qualified governments under Chapter 8 of Title 50 shall be suspended until such time as a final ruling upholding the findings of the state auditor is issued.

(ii) A new compliance report submitted to the state auditor by the political subdivision shall be deemed satisfactory and shall correct the prior deficient compliance report so long as the new report fully complies with this subsection.

(iii) No political subdivision of this state shall be found to be in violation of this subsection by the state auditor as a result of any actions of a county constitutional officer.

(D) If the state auditor finds any political subdivision which is a state department or agency to be in violation of the provisions of this subsection twice in a five-year period, the funds appropriated to such state department or agency for the fiscal year following the year in which the agency was found to be in violation for the second time shall be not greater than 90 percent of the amount so

appropriated in the second year of such noncompliance. Any political subdivision found to be in violation of the provisions of this subsection shall be listed on www.open.georgia.gov or another official state website with an indication and explanation of each violation.

(8) Contingent upon appropriation or approval of necessary funding and in order to verify compliance with the provisions of this subsection, each year the Commissioner shall conduct no fewer than 100 random audits of public employers and contractors or may conduct such an audit upon reasonable grounds to suspect a violation of this subsection. The results of the audits shall be published on the www.open.georgia.gov website and on the Georgia Department of Labor's website no later than December 31 of each year. The Georgia Department of Labor shall seek funding from the United States Secretary of Labor to the extent such funding is available.

(9) Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement in an affidavit submitted pursuant to this subsection shall be guilty of a violation of Code Section 16-10-20 and, upon conviction, shall be punished as provided in such Code section. Contractors, subcontractors, sub-subcontractors, and any person convicted for false statements based on a violation of this subsection shall be prohibited from bidding on or entering into any public contract for 12 months following such conviction. A contractor, subcontractor, or sub-subcontractor that has been found by the Commissioner to have violated this subsection shall be listed by the Department of Labor on www.open.georgia.gov or other official website of the state with public information regarding such violation, including the identity of the violator, the nature of the contract, and the date of conviction. A public employee, contractor, subcontractor, or sub-subcontractor shall not be held civilly liable or criminally responsible for unknowingly or unintentionally accepting a bid from or contracting with a contractor, subcontractor, or sub-subcontractor acting in violation of this subsection. Any contractor, subcontractor, or sub-subcontractor found by the Commissioner to have violated this subsection shall, on a second or subsequent violations, be prohibited from bidding on or entering into any public contract for 12 months following the date of such finding.

(10) There shall be a rebuttable presumption that a public employer, contractor, subcontractor, or sub-subcontractor receiving and acting upon an affidavit conforming to the content requirements of this subsection does so in good faith, and such public employer, contractor, subcontractor, or sub-subcontractor may rely upon such affidavit as being true and correct. The affidavit shall be admissible in any court of law for the purpose of establishing such presumption.

(11) Documents required by this Code section may be submitted electronically, provided the submission complies with Chapter 12 of Title 10.

(c) This Code section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

(d) Except as provided in subsection (e) of this Code section, the Commissioner shall prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this Code section and publish such rules and regulations on the Georgia Department of Labor's website.

(e) The commissioner of the Georgia Department of Transportation shall prescribe all forms and promulgate rules and regulations deemed necessary for the application of this Code section to any contract or agreement relating to public transportation and shall publish such rules and regulations on the Georgia Department of Transportation's website.

(f) No employer or agency or political subdivision, as such term is defined in Code Section 50-36-1, shall be subject to lawsuit or liability arising from any act to comply with the requirements of this Code section. (Code 1981, § 13-10-91, enacted by Ga. L. 2006, p. 105, § 2/SB 529; Ga. L. 2009, p. 970, § 1/HB 2; Ga. L. 2010, p. 308, § 2.A/SB 447; Ga. L. 2011, p. 794, § 3/HB 87.)

The 2011 amendment, effective July 1, 2011, in subsection (a), substituted "then the local government shall submit such information to the Carl Vinson Institute of Government of the University of Georgia to be posted by the institute on the website created for local government audit and budget reporting" for "the identification number and date of authorization shall be published annually in the official legal organ for the county" at the end of the second sentence and added the third sentence; in the first sentence of paragraph (b)(1), substituted "A public" for "No public", inserted "not", deleted "within this state" following "performance of services", and deleted "to verify information of all newly hired employees or subcontractors" following "authorization program"; in subparagraph (b)(1)(A), substituted a comma for "and" and inserted ", and uses"; deleted "and" at the end of subparagraph (b)(1)(B); in subparagraph (b)(1)(C), deleted "is using and" following "The affiant" at the beginning and added "; and" at the end; added subparagraph (b)(1)(D); substituted the present provisions of paragraph (b)(2) for the former provisions, which read: "No contractor or subcontractor who enters a contract pursuant to this chapter with a public employer or a contractor of a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the federal work authorization program to verify information of all newly hired employees. Any employee, contractor, or subcontractor of such contractor or subcontractor shall also be required to satisfy the requirements of this paragraph."; substituted the present provisions of paragraph (b)(3) for the former provisions, which read: "Upon contracting with a new subcontractor, a contractor or subcontractor shall, as a condition of any contract or subcontract entered into pursuant to this chapter, provide a public employer with notice of the identity of any and all subsequent subcontractors hired or contracted

by that contractor or subcontractor. Such notice shall be provided within five business days of entering into a contract or agreement for hire with any subcontractor. Such notice shall include an affidavit from each subsequent contractor attesting to the subcontractor's name, address, user identification number, and date of authorization to use the federal work authorization program."; added paragraphs (b)(4) through (b)(7); redesignated former paragraphs (b)(4) and (b)(5) as present paragraphs (b)(8) and (b)(9), respectively; added "or may conduct such an audit upon reasonable grounds to suspect a violation of this subsection" at the end of the first sentence in paragraph (b)(8); in paragraph (b)(9), in the second sentence, substituted a comma for "and" and inserted "sub-subcontractors, and any person", and added the third through fifth sentences; and added paragraphs (b)(10) and (b)(11). See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that the amendment by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

CHAPTER 11

PROMPT PAYMENT

Law reviews. — For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

13-11-1. Short title.

Law reviews. — For annual survey on admiralty, see 62 Mercer L. Rev. 1053 (2011).

13-11-2. Definitions.

JUDICIAL DECISIONS

"Contractor". — Given that an owner had an interest in the real property where the contractor performed the improvements and that the owner ordered the

improvements to be made, the contractor was a "contractor" under the Prompt Pay Act, O.C.G.A. § 13-11-2, and entitled to attorney's fees and postjudgment interest against the owner under O.C.G.A. § 13-11-8. No showing of bad faith was required. Elec. Works CMA, Inc. v. Baldwin Tech. Fabrics, LLC, 306 Ga. App. 705, 703 S.E.2d 124 (2010).

13-11-8. Attorneys' fees.

JUDICIAL DECISIONS

Award of fees to contractor appropriate. — Given that an owner had an interest in the real property where the contractor performed the improvements and that the owner ordered the improvements to be made, the contractor was a "contractor" under the Prompt Pay Act, O.C.G.A. § 13-11-2 and entitled to attorney's fees and postjudgment interest against the owner under O.C.G.A. § 13-11-8. No showing of bad faith was required. Elec. Works CMA, Inc. v. Baldwin Tech. Fabrics, LLC, 306 Ga. App. 705, 703 S.E.2d 124 (2010).